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**CHAPMAN v. COMMONWEALTH: DEATH ROW VOLUNTEERS,
COMPETENCY, AND “SUICIDE BY COURT”**

INTRODUCTION

On August 23, 2002 Marco Allen Chapman murdered seven-year-old Chelbi Sharon and her six-year-old brother, Cody.¹ Chapman left for dead the children’s ten-year-old sister, Courtney, and their mother, Carolyn Marksberry, after stabbing each multiple times.² Chapman was executed by lethal injection on November 21, 2008.³ However, no jury convicted him of the murders or sentenced him to death. Rather, Chapman pleaded guilty to the murders, fired his attorneys, and requested the death penalty.⁴ His stated intent was to commit “suicide by court.”⁵

Chapman was a death row volunteer, generally speaking, an inmate who chooses to forgo presenting mitigating evidence at sentencing or to waive appeals and collateral review in order to hasten execution.⁶ Outside the legal profession, this case may seem like an easy one—a man who savagely murdered two children while attempting to murder their entire family would prefer to accept his death sentence now rather than endure a decade or more on death row. The state saves money on costly appeals, the victims and their loved ones are spared a lengthy courtroom battle, and justice is served without undue delay. For scholars, practitioners, and students of our criminal justice system, however, the phenomenon of death row volunteerism poses a number of difficult questions.⁷

1. Brief for Appellee at 1–2, *Chapman v. Commonwealth*, No. 2005-SC-70-MR, 2007 WL 2404429 (Ky. Aug. 23, 2007) [hereinafter Brief for Appellee].

2. *Id.*

3. *Around the Nation*, HOUSTON CHRONICLE, Nov. 22, 2008, at A10.

4. Mike Rutledge, *Murderer Pleads, Wants Death*, CIN. ENQUIRER, Dec. 8, 2004, at A1.

5. Brief for Appellant at 3, *Chapman v. Commonwealth*, No. 2005-SC-70-MR, 2007 WL 2404429 (Ky. Aug. 23, 2007) [hereinafter Brief for Appellant].

6. See, e.g., WELSH S. WHITE, THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT 164–85 (1991); see also Richard W. Garnett, *Sectarian Reflections on Lawyers’ Ethics and Death Row Volunteers*, 77 NOTRE DAME L. REV. 795, 796 & n.2 (March 2002) (describing the forms of death row volunteerism and the irony of the term).

7. See, e.g., John H. Blume, Killing the Willing, “Volunteers,” Suicide and Competency, 103 MICH. L. REV. 939, 940 n.5 (2005) (citations omitted); see also Anthony J. Casey, Maintaining the Integrity of Death: An Argument for Restricting a Defendant’s Right to

Consider the following: Should courts allow capital defendants to abandon their appeals? Or should the state's interest in administering the death penalty reliably, even-handedly, and justly prevail over the defendant's autonomy—his right to self-determination and the freedom to accept his punishment? What remains of the adversary system when the goals of the defendant and prosecutor align with defense counsel on the other side? How should defense counsel respond to an irreconcilable conflict between zealous advocacy and the client's wishes? Finally, who should be allowed to volunteer? What is the standard for competency to volunteer, why do defendants choose to volunteer, and are these two inquiries related?

In fact, Chapman's case brings these tensions and competing concerns into sharper relief in that he "volunteered" before trial, waiving his right to have an impartial finder-of-fact decide his guilt or innocence or to determine his sentence.⁸

This note will explore how Chapman's case informs the current debate over death row volunteerism, emphasizing the discussion of competency in particular. Part I is an overview of volunteerism, addressing the major issues and the basic arguments on each side of the debate. It will also cover in depth the Supreme Court case that set the standard for competence, as well as some judicial and scholarly critique of that decision. Part II is an account of the Chapman case including the factual and procedural history and an analysis of the Kentucky Supreme Court's unanimous decision upholding Chapman's death sentence. Part III analyzes Chapman's case in light of the current competency standard and in light of the criticism of the prevailing standard. It asks whether a different, heightened standard is enough to satisfy opponents of volunteerism and concludes that such a revised standard is not. Part III then explores procedural safeguards as an alternative to a modified competency standard. Finally, Part IV touches briefly on the challenges that face opponents to volunteerism and concludes with an endorsement of minimal procedural safeguards courts should adopt to protect the integrity of the death sentence.

Volunteer for Execution at Certain Stages in Capital Proceedings, 30 AM. J. CRIM. L. 75, 76 & nn.1-2 (2002) (citations omitted). Both authors cite an early authority on death row volunteers. G. Richard Strafer, Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention, 74 J. CRIM. L. & CRIMINOLOGY 860, 860-61 (1983). Strafer wrote seven years after the Supreme Court re-imposed the death penalty in *Gregg v. Georgia*, 428 U.S. 153 (1976), and was able to list each of the eight men who had been executed up to that point, five of whom were volunteers. *Id.* at 860-62, 860 n.2. Since 1977, 1123 men and women have been executed, 130 of whom volunteered in some capacity. See Death Penalty Info. Ctr., Searchable Database of Executions, <http://www.deathpenaltyinfo.org/searchable-database-executions> (For data on executions, click "Get Info;" for data on volunteers, then return and search "Volunteer" under "Special Factors" and click "Get Info") (last visited Apr. 8, 2009).

8. See Rutledge, *supra* note 4.

I. VOLUNTEERING AND COMPETENCE

A. *Death Row Volunteers: History & Issues*

Death row volunteerism is not a recent development. Since 1976, when the Supreme Court reinstated states' right to execute prisoners in *Gregg v. Georgia*,⁹ roughly twelve percent of all executions have been the result of volunteerism.¹⁰ In fact, Gary Gilmore, the first prisoner executed after the reinstatement of the death penalty, was an especially vocal volunteer.¹¹

Volunteers present the criminal justice system with a number of serious concerns which one commentator has divided into three basic areas: the competence of the volunteer, the stress it puts on the adversarial system, and the ethical problems of representing death row clients.¹² The discussion on death row volunteerism arises from a philosophical divide,¹³ with those who oppose allowing death row inmates to circumvent the sentencing process or to waive appeals on one side,¹⁴ and those who support the condemned's right to pursue or abandon his defense on the other side.¹⁵ It is worth noting, as one

9. 428 U.S. 153 (1976).

10. According to the Death Penalty Information Center (DPIC), 1123 individuals have been executed since 1976, 130 of whom (or 11.6%) were volunteers. See Searchable Database of Executions, *supra* note 7.

11. See Matthew T. Norman, Note, Standards and Procedures for Determining Whether a Defendant Is Competent to Make the Ultimate Choice—Death; Ohio's New Precedent for Death Row "Volunteers," 13 J.L. & HEALTH 103, 111–13 (1998–99) (summarizing the story of Gary Gilmore).

12. David A. Davis, Choosing Death: Florida's Treatment of Death Row Volunteers, 40 CRIM. L. BULL. 260, 262 (2004).

13. See Blume, *supra* note 7, at 948–54 (summarizing the debate over volunteering).

14. See, e.g., Linda E. Carter, Maintaining Systemic Integrity in Capital Cases: The Use of Court-Appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death, 55 TENN. L. REV. 95 (1987) (concluding that the Eighth Amendment's prohibition of cruel and unusual punishment requires the presentation of mitigating evidence and recommending that courts appoint special counsel to present mitigating evidence when the defendant seeks to prevent defense counsel from doing so); Casey, *supra* note 7, at 101–05 (arguing that the state's interest in preserving the integrity of the death penalty outweighs the individual inmate's interest in controlling his own defense at the trial and sentencing stages).

15. See, e.g., Melvin I. Urofsky, *A Right to Die: Termination of Appeal for Condemned Prisoners*, 75 J. CRIM. L. & CRIMINOLOGY 553, 582 (1984) ("After the State takes all possible precautions to avoid error [in imposing a death sentence] and at the same time protect the interests of society, the final decision on whether to pursue or terminate appeals should be left to one person—that person whose life is at stake."); Julie Levinsohn Milner, Note, *Dignity or Death Row: Are Death Row Rights to Die Diminished? A Comparison of the Right to Die for the Terminally Ill and the Terminally Sentenced*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 279 (1998) (analogizing terminally ill patients and death row inmates and concluding that death row inmates should have the right to waive sentencing and appeals subject only to a competency determination).

commentator has said, that “[p]erhaps not surprisingly, those who argue that death-sentenced inmates should not be permitted to waive their appeals are overwhelmingly opposed to the death penalty, while those arguing for a generous waiver standard are, on the other hand, almost always supporters of the death penalty.”¹⁶

Opponents of volunteerism align with Justice Thurgood Marshall, who penned a series of dissents in death penalty cases¹⁷ articulating the major concerns that should prevent the state from allowing defendants to choose the death penalty. In *Lenhard v. Wolff*, Marshall, an outspoken death penalty abolitionist,¹⁸ summarized these concerns:

[T]he consent of a convicted defendant in a criminal case does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment. . . . [T]he Eighth Amendment not only protects the right of individuals not to be victims of cruel and unusual punishment, but . . . it also expresses a fundamental interest of society in ensuring that state authority is not used to administer barbaric punishments.

Society’s independent stake in enforcement of the Eighth Amendment’s prohibition against cruel and unusual punishment cannot be overridden by a defendant’s purported waiver. By refusing to pursue his Eighth Amendment claim, [the defendant] has, in effect, sought the State’s assistance in committing suicide.¹⁹

Opponents of inmates’ right to volunteer often invoke the label “state-assisted suicide” and speak of the state’s vital interest in maintaining integrity and consistency in capital sentencing.²⁰

On the other hand, proponents of allowing inmates to waive appeals and volunteer speak equally often of respecting the autonomy of the inmate to choose his defense, or to choose to have his just punishment administered without undue delay. Volunteering is not suicide because “society—through a jury or judge—has found the death penalty to be the appropriate punishment

16. Blume, *supra* note 7, at 952. I should note here that I support the abolition of the death penalty. However, so long as capital punishment endures, I do not oppose volunteering in all circumstances. See *infra* Part IV.

17. See Blume, *supra* note 7, at 948 (quoting *Lenhard v. Wolff*, 444 U.S. 807, 811 (1979) (Marshall, J., dissenting), and adding “[t]hose who oppose a death-row inmate’s right to waive his appeals and submit to execution generally echo Marshall’s . . . objections”); Kristen M. Dama, Comment, *Redefining a Final Act: The Fourteenth Amendment and States’ Obligation to Prevent Death Row Inmates from Volunteering to Be Put to Death*, 9 U. PA. J. CONST. L. 1083, 1089–90 (2007). (Discussing and quoting Marshall’s dissents in *Gilmore v. Utah*, 429 U.S. 1012, 1019 (1976) and *Whitmore v. Arkansas*, 495 U.S. 149, 171–72 (1990)).

18. See *Lenhard*, 444 U.S. at 808 (Marshall, J., dissenting) (“I continue to adhere to my view that the death penalty is unconstitutional in all circumstances.”).

19. *Id.* at 810–11 (internal citations and quotation marks omitted).

20. See, e.g., Blume, *supra* note 7, at 948–50.

for the defendant's crime"²¹ Granting an inmate the right to volunteer preserves the convict's dignity and humanity through self-determination, lest a just punishment be carried out in a cruel fashion.²²

Competence, which the next part will explore, is "squarely in the center of the debate"²³ since opponents question whether an inmate can ever rationally choose to abandon his defense, and supporters point to the logic of a condemned person accepting his punishment without further delay.²⁴

B. *Godinez: A Unitary Standard for Competence*

The standard for competence to volunteer for execution evolved by a "slow and fitful process,"²⁵ settled, for now, by the Supreme Court's opinion in *Godinez v. Moran*.²⁶ The Court held that due process requires precisely the same level of competence to stand trial with assistance of counsel as to plead guilty, waive right to counsel, and abandon appeals—that is, to volunteer.²⁷ The decision resolved a circuit split with the Ninth and District of Columbia Circuits requiring a different standard to plead guilty and dismiss counsel than to stand trial, and every other circuit applying the same standard to both.²⁸

Moran confessed to fatally shooting two people at a bar and killing his ex-wife nine days later.²⁹ Moran initially pleaded not guilty to three counts of first-degree murder, and was examined by two different psychiatrists, both of whom found him competent.³⁰ Just a few months afterwards, Moran appeared before the court and expressed his intention to dismiss his attorneys and plead guilty.³¹ The trial judge then examined Moran at length.³² The judge advised Moran of the potential pitfalls associated with self-representation, questioned him regarding his understanding of the nature and consequences of his actions, and whether his decision was the result of any improper influences including drugs and alcohol.³³ The trial judge was satisfied with Moran's competence, and accepted his waiver of counsel and his guilty plea.³⁴ Moran then declined

21. *Id.* at 952.

22. *Id.* at 951–52.

23. *Id.* at 953.

24. *Id.* at 950–53 (quoting C. Lee Harrington, *A Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering*, 25 LAW & SOC. INQUIRY 849, 855 (2000)).

25. Blume, *supra* note 7, at 943 (citing Norman, *supra* note 11, at 122).

26. 509 U.S. 389 (1993).

27. *Id.* at 399–401.

28. *Id.* at 395–96, 395 n.5.

29. *Id.* at 391–92.

30. *Id.* at 391.

31. *Godinez*, 509 U.S. at 392–93.

32. *Id.*

33. *Id.* at 392–93, 393 n.2.

34. *Id.* at 392–93.

to present any mitigating evidence or call any witnesses at his sentencing, and a three-judge panel sentenced him to death.³⁵ The Nevada Supreme Court upheld his death sentence for the two victims in the bar, but reduced his sentence to life without parole for the murder of his ex-wife.³⁶

Moran later sought post-conviction relief, claiming he had been incompetent to plead guilty and represent himself.³⁷ After the Nevada Supreme Court rejected this petition (and the U.S. Supreme Court denied certiorari), Moran filed for habeas corpus in federal court.³⁸ The District Court denied the petition, but the Ninth Circuit Court of Appeals reversed.³⁹ Relying on the Supreme Court's two-paragraph opinion in *Westbrook v. Arizona*,⁴⁰ the court found that "[c]ompetency to waive constitutional rights requires a higher level of mental functioning than that required to stand trial."⁴¹ Due process required the trial court to hold a separate evidentiary hearing to determine whether Moran had "the capacity for 'reasoned choice' among the alternatives available to him,"⁴² not simply a rational and factual understanding of the proceedings, the standard for competency to stand trial since *Dusky v. United States*.⁴³

The United States Supreme Court disagreed, finding the Circuit Court's reliance on *Westbrook* misplaced.⁴⁴ *Westbrook* did not require a higher or different standard for competence to waive right to counsel, but merely an additional finding by the trial court that the waiver was knowing and voluntary.⁴⁵ Furthermore, the Court could discern no apparent difference between the *Dusky* standard of "rational understanding" and the Ninth Circuit's putatively heightened "reasoned choice" standard.⁴⁶ Defendants who plead not guilty and proceed with counsel are faced with choices as profound and grave as defendants who plead guilty and waive counsel, such as whether to waive the privilege against self-incrimination (by testifying), the right to confront accusers or trial by jury, and strategic choices such as "whether (and how) to put on a defense and whether to raise one or more affirmative

35. *Id.*

36. *Godinez*, 509 U.S. at 393.

37. *Id.*

38. *Id.*

39. *Id.* at 389.

40. 384 U.S. 150 (1966) (per curiam).

41. *Moran v. Godinez*, 972 F.2d 263, 265–66 (9th Cir. 1992), *rev'd Godinez*, 509 U.S. at 389.

42. *Id.* at 266–67.

43. 362 U.S. 402 (1960).

44. *Godinez*, 509 U.S. at 397.

45. *Id.* at 400–02.

46. *Id.* at 398.

defenses.”⁴⁷ “If the *Dusky* standard is adequate for defendants who plead not guilty, it is necessarily adequate for those who plead guilty,” and “there is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights.”⁴⁸

Thus, a defendant who seeks to plead guilty and dismiss his attorney is subject to a two-part inquiry. First, the defendant must be found competent to stand trial under the *Dusky* standard or its reiteration in *Drope v. Missouri*: a defendant must have the “capacity to understand the nature and object of the proceedings against him, consult with counsel, and to assist in preparing his defense.”⁴⁹ Second, the defendant’s waiver of his rights must be knowing and voluntary.⁵⁰ The trial court discharged its duty first by finding Moran competent to stand trial after evaluation by two psychiatrists and second by its explicit finding Moran was “‘knowingly and intelligently’ waiving his right to the assistance of counsel, and that his guilty pleas were ‘freely and voluntarily’ given.”⁵¹ Due process did not require the trial court to hold an additional competency hearing unless it had reason to doubt Moran’s competence, which it did not⁵², because the standard is unchanged at the later stage of the trial.⁵³

The Due Process standard, then, is settled but is not without its critics, including Justice Blackmun, who filed a dissenting opinion in *Godinez* in which Justice Stevens joined.⁵⁴

C. *The Godinez Dissent*

The dissent was concerned that applying the same competency standard to defendants standing trial *with* counsel as to defendants waiving counsel left the Court open to “uphold[ing] the death sentence for a person whose decision to

47. *Id.*

48. *Id.* at 399. “[G]reater powers of comprehension, judgment, and reason” are not required to proceed without an attorney, because “the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself.” *Id.* (internal quotation marks omitted) (emphasis added).

49. *Drope v. Missouri*, 420 U.S. 162, 171 (1975).

50. *Godinez*, 509 U.S. at 400 (citations omitted).

51. *Id.* at 393 (citations omitted).

52. *See id.* at 401 n.13 (citing *Drope*, 420 U.S. at 180–81) (“As in any criminal case, a competency determination is necessary only when a court has reason to doubt the defendant’s competence.”); *see also id.* at 401 n.14 (“In this case the trial court explicitly found both that respondent was competent and that his waivers were knowing and voluntary.”).

53. *See id.* at 404 (Kennedy, J., concurring) (“The Due Process Clause does not mandate different standards of competency at various stages of or for different decisions made during the criminal proceedings. That was never the rule at common law, and it would take some extraordinary showing of the inadequacy of a single standard of competency for us to require States to employ heightened standards.”).

54. *Id.* at 409–17 (Blackmun, J., dissenting).

discharge counsel, plead guilty, and present no defense well may have been the product of medication or mental illness.”⁵⁵ Echoing the Ninth Circuit’s concerns,⁵⁶ the dissent cited the opinions of the two psychiatrists who examined Moran and found that he was “very depressed” and thus he “may be inclined to exert less effort towards his own defense.”⁵⁷ The dissent then criticized the perfunctory manner in which the trial court examined Moran before accepting his guilty plea and waiver of counsel⁵⁸ and the trial judge’s failure to question Moran further regarding the prescription medications he was taking.⁵⁹

55. *Godinez*, 509 U.S. at 409.

56. The Circuit Court claimed there was “substantial evidence at the time [Moran] pled guilty to trigger a good faith doubt about his competency to waive constitutional rights.” *Moran v. Godinez*, 972 F.2d 263, 265 (9th Cir. 1992). The court specifically noted: 1) Moran’s suicide attempt, which, according to its reading of *Drope*, was a factor on which the Supreme Court had based its “conclusion that the state court should have held a hearing to determine [the defendant’s] competency to stand trial,”; 2) his desire to fire his attorneys and prevent the presentation of mitigating evidence at his sentencing hearing; 3) his “monosyllabic” answers to the trial judge’s questions during the colloquy establishing his competence; and, 4) that Moran was taking four different prescription drugs. *Id.* & n.3.

57. *Godinez*, 509 U.S. at 409–10 (Blackmun, J., dissenting) (internal citations omitted).

58. The dissent was quick to point out “although the majority’s exposition of the events is accurate, the most significant facts are omitted or relegated to footnotes.” *Id.* at 409. The majority did in fact omit one particularly troubling exchange between Moran and the trial judge: When the trial judge asked him whether he killed his ex-wife “deliberately, with premeditation and malice aforethought,” Moran unexpectedly responded: “No. I didn’t do it—I mean, I wasn’t looking to kill her, but she ended up dead.” Instead of probing further, the trial judge simply repeated the question, inquiring again whether Moran had acted deliberately. Once again, Moran replied: “I don’t know. I mean, I don’t know what you mean by deliberately. I mean, I pulled the trigger on purpose, but I didn’t plan on doing it; you know what I mean?” Ignoring the ambiguity of Moran’s responses, the trial judge reframed the question to elicit an affirmative answer, stating: “Well, I’ve previously explained to you what is meant by deliberation and premeditation. Deliberate means that you arrived at or determined as a result of careful thought and weighing the consideration for and against the proposed action. Did you do that?” This time, Moran responded: “Yes.”

Id. at 411–12 (citations omitted).

59. *Id.* at 410–11 n.1 (citations omitted). The contrast between the majority’s and the dissent’s discussion of Moran’s medication is noteworthy. Reciting the trial judge’s finding that Moran had waived his right to counsel and plead guilty knowingly and voluntarily, the majority then added in a footnote:

During the course of this lengthy exchange, the trial court asked respondent whether he was under the influence of drugs or alcohol, and respondent answered as follows: “Just what they give me in, you know, medications.” The court made no further inquiry. The “medications” to which respondent referred had been prescribed to control his seizures, which were a byproduct of his cocaine use.

Id. at 393 n.2 (majority opinion) (citations omitted). On the other hand, the dissent noted with emphasis that Moran was on four different drugs at the time, and “later testified to the numbing effects of these drugs, stating: ‘I guess I really didn’t care about anything . . . I wasn’t very

For the dissent, a different, perhaps higher, but certainly more individualized competency standard naturally attaches to waiving counsel than to standing trial with counsel because of the different contexts in which each arises:

[T]he standard for competence to stand trial is specifically designed to measure a defendant's ability to "consult with counsel" and to "assist in preparing his defense." A finding that a defendant is competent to stand trial establishes only that he is capable of aiding his attorney in making the critical decisions required at trial or in plea negotiations. The reliability or even relevance of such a finding vanishes when its basic premise—that counsel will be present—ceases to exist. The question is no longer whether the defendant can proceed with an attorney, but whether he can proceed alone and uncounseled. . . .

The majority concludes that there is no need for such a hearing because a defendant who is found competent to stand trial with the assistance of counsel is, *ipso facto*, competent to discharge counsel and represent himself. But the majority cannot isolate the term "competent" and apply it in a vacuum, divorced from its specific context. A person who is "competent" to play basketball is not thereby "competent" to play the violin. The majority's monolithic approach to competency is true to neither life nor the law. Competency for one purpose does not necessarily translate to competency for another purpose.⁶⁰

Logically, to the dissent, competency to waive assistance of counsel also implies competency to represent oneself "because the former decision necessarily entails the latter."⁶¹ So what then, according to the dissent, is the standard for competency to self-represent?

The dissent did not offer a clear response, but stated the Court's 1966 decision in *Rees v. Peyton* "hinted at [the] contours" of a standard when it "required competency evaluations to be specifically tailored to the context and purpose of a proceeding."⁶² *Rees* asked what level of competence a capital defendant must show in order to withdraw a petition for certiorari:

[In *Rees*], this Court directed the lower court to conduct an inquiry as to whether the defendant possessed the "capacity to appreciate his position and make a *rational choice* with respect to continuing or abandoning further

concerned about anything that was going on . . . as far as the proceedings and everything were going." *Id.* at 410–11 (Blackmun, J., dissenting). Then in a footnote the dissent detailed the medications Moran was taking and listed their possible side effects. *Id.* at 411, n.1. Here, the dissent mirrors the Ninth Circuit's treatment of the issue, but in fact goes further by not only listing the drugs and their uses, but also their side effects. *See Moran*, 972 F.2d at 265 n.4.

60. *Godinez*, 509 U.S. at 412–13 (Blackmun, J., dissenting).

61. *Id.* at 416.

62. *Id.* at 413–14 (citing *Rees v. Peyton*, 384 U.S. 312, 314 (1966)). The dissent noted that the Court in *Rees* directed the lower court "to determine [petitioner's] mental competence in the present posture of things." *Id.* at 413.

litigation or on the other hand whether he is suffering from a mental disease, disorder or defect which may substantially affect his capacity in the premises.”⁶³

According to the *Godinez* dissent, the capacity for a “rational choice” in *Rees* was essentially the same standard as the Ninth Circuit’s “capacity for a ‘reasoned choice’ among the alternatives” in Moran’s case.⁶⁴ While the *Godinez* majority could see no difference between the Ninth Circuit’s “reasoned” or “rational choice” proposed to waive counsel and plead guilty and the “rational understanding” required by *Dusky* and *Drope* to stand trial,⁶⁵ Blackmun saw a marked difference, and added in a pithy footnote: “What the majority fails to recognize is that, in the distinction between a defendant who possesses a ‘rational understanding’ of the proceedings and one who is able to make a ‘rational choice,’ lies the difference between the capacity for passive and active involvement in the proceedings.”⁶⁶

Whether or not Blackmun finally intended the capacity for “rational choice” to be the test for competency to waive counsel and plead guilty, what clearly concerned him most was the effect that medication or mental illness might have on a defendant’s competence, and the majority’s failure to account for it. Blackmun had “no doubt” that the trial judge should have questioned Moran’s competency to dismiss his lawyers given the evidence:

To try, convict, and punish one so helpless to defend himself contravenes fundamental principles of fairness and impugns the integrity of our criminal justice system. I cannot condone the decision to accept, without further inquiry, the self-destructive “choice” of a person who was so deeply medicated and who might well have been severely mentally ill.⁶⁷

In fact, the *Godinez* standard has drawn scholarly criticism for concerns similar to those outlined by Blackmun’s dissent.

D. Scholarship and the Current Standard

One theme running through much scholarly criticism of the *Godinez* competency standard and its forebears, *Dusky* and *Drope*, is that a “one size fits all” standard, by its nature, fails to account for differences between individual inmates, leading to unjust results in some cases.⁶⁸ This echoes

63. *Id.* at 415 (quoting *Rees*, 384 U.S. at 314 (emphasis added)).

64. *Id.*; *Moran*, 972 F.2d at 266 (citations omitted).

65. *Godinez*, 509 U.S. at 398.

66. *Id.* at 415 n.3 (Blackmun, J., dissenting).

67. *Id.* at 417.

68. See, e.g., Ronald L. Kuby & William M. Kunstler, *So Crazy He Thinks He Is Sane: The Colin Ferguson Trial and the Competency Standard*, 5 CORNELL J.L. & PUB. POL’Y 19 (Fall 1995). Kuby and Kunstler represented Colin Ferguson at trial before Ferguson dismissed them. See *id.* at 19. Ferguson was diagnosed with delusional disorder by the defense psychiatrist, and

Justice Blackmun's concern in his *Godinez* dissent that competence as to one thing, such as understanding the nature of the proceedings and assisting counsel in your defense, does not necessarily entail competence as to something else, such as dismissing counsel altogether and pleading guilty.⁶⁹ The context of waiving counsel and proceeding *pro se* demands something different, perhaps more, from a defendant than the context of standing trial with a lawyer demands. Behind this particular critique of *Godinez* is a belief that it is unjust to grant *Faretta*'s claim "that although the defendant 'may conduct his own defense ultimately to his own detriment, his choice must be honored.'"⁷⁰ Our system of criminal justice owes something more to the individual defendant than the *Godinez* Court's resignation to the fact that "while '[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts,' a criminal defendant's ability to represent himself has no bearing upon his competence to *choose* self-representation."⁷¹

One author, a psychiatrist, notes that *Godinez* thereby extends *Faretta*'s right to self-representation to include the right to represent oneself incompetently.⁷² The *Godinez* dissent was "much more tightly reasoned . . . and in agreement with the real exigencies of proceeding to trial *pro se* than [] the majority opinion."⁷³ The *Godinez* standard measures only the defendant's "decisional capacity," that is, the mental functions required to *decide* whether to waive counsel.⁷⁴ According to the author, the Court "entirely neglected the voice of reason" by not also incorporating a "functional capacity" element into the competency standard.⁷⁵ "[T]he defendant who represents himself or herself must have greater powers of comprehension, judgment, and reason than would

even the prosecution psychiatrist stated that Ferguson was "very, very paranoid." *Id.* Ferguson, according to his lawyers, had an "irrational belief that there existed multiple conspiracies against him," including one involving his attorneys, yet the trial court found he was competent to stand trial because he "could understand the nature of the charges against him and could assist in his own defense" and was thus competent to represent himself. *Id.* at 19–20. Ferguson's self-representation resulted in a "bizarre trial" which was an "obscene spectacle," a "mock[er] of justice," and "a good example of just how insane one can be and yet be found competent to stand trial." *Id.* at 19, 24.

69. See *supra* text accompanying note 60.

70. *Godinez*, 509 U.S. at 400 (citing *Faretta*, 422 U.S. at 834).

71. *Id.*

72. Alan R. Felthous, The Right to Represent Oneself Incompetently: Competency to Waive Counsel and Conduct One's Own Defense Before and After *Godinez*, 18 MENTAL & PHYSICAL DISABILITY L. REP. 105 (Feb. 1994).

73. *Id.* at 108.

74. See *id.* at 105. Felthous also notes that the practice of applying the same standard both to the competency to stand trial and competency to waive counsel was common to many courts before *Godinez*. *Id.*

75. *Id.* at 109.

be necessary to stand trial with the aid of an attorney.”⁷⁶ The author closes by noting that “the Supreme Court in *Godinez* missed an opportunity to promote reason, logic, and justice in American jurisprudence,” but that the decision did not forestall state legislatures from demanding more.⁷⁷

Another scholar, John H. Blume, argues not that *Godinez* settled on the wrong standard,⁷⁸ but that competence alone is not enough when it comes to deciding whether to prevent or allow volunteers to waive appeals and acquiesce in their death sentence.⁷⁹ Blume recasts the debate over competency and volunteering in terms of suicide and motivation, incorporating society’s general disapproval of suicide and the current legal barriers to physician-assisted suicide.⁸⁰ With empirical and anecdotal data in hand, he asks with incisively simple logic: if we disapprove of suicide then should we allow death row inmates who wish to commit suicide to do so with the help of the criminal justice system?⁸¹

Death row volunteers, it turns out, share many striking similarities with those who commit suicide in the outside world. Overwhelmingly, they are white males who suffer from mental illness and substance abuse disorders.⁸² Over a two-year period, 73% of all suicides in the United States were committed by white men.⁸³ Blume continues:

According to the National Institute of Mental Health (“NIMH”), over 90% of suicide victims suffer from a diagnosable mental disorder, most commonly a depressive disorder or a substance-abuse disorder. There is also a high prevalence of bipolar disorder, post-traumatic stress disorder, and other personality disorders. Substance abuse is found in 25% to 55% of suicides, though two-thirds of suicide victims who were substance abusers also suffered from a major depressive episode.⁸⁴

Moreover, depression, alcohol abuse, and cocaine use are among the strongest risk factors for attempted suicide among adults.⁸⁵ Blume went on to analyze comparable demographic data for death row volunteers:

76. *Id.* at 110 (internal quotation marks omitted) (citation omitted).

77. Felthous, *supra* note 72, at 110. In *Indiana v. Edwards* the Court reaffirmed this portion of *Godinez*, holding that a state may constitutionally deny a defendant who is competent to stand trial the right to represent himself if it found him incompetent to conduct trial proceedings. 128 S.Ct. 2379, 2388 (2008).

78. See Blume, *supra* note 7, at 945–46. Neither does he claim that *Godinez* is the *right* standard, but for his purposes it simply *is* the standard. *Id.*

79. *Id.* at 973.

80. *Id.* at 942.

81. See *id.*

82. *Id.* at 961–64.

83. Blume, *supra* note 7, at 956 (citations omitted).

84. *Id.* at 956–57 (citations omitted).

85. *Id.* at 958.

Almost 85% of those who were executed after waiving their appeals are white males, despite the fact that white males account for only about 45% of all death-row inmates. Looked at from the perspective of the other major racial group on death row, African Americans, the pattern is equally stark: only 3% of volunteer executions involved black men, who comprise 42% of the current death-row population.⁸⁶

Digging into the etiological data on volunteers, Blume uncovered further striking parallels with suicide outside the prison context. Among volunteers, 88% suffered from mental illness, severe substance abuse disorders, or both.⁸⁷ But by Blume's assessment,

[e]ven more striking is the prevalence of the most severe mental illness (which also happens to be the strongest suicide predictor): fourteen [of the 106] cases involved schizophrenia, and several more reported delusions that may reflect schizophrenia. Depression, and its half-sibling, bipolar disorder, accounted for at least twenty-three other cases, and post-traumatic stress disorder was present in another ten. Finally, at least thirty had previously attempted suicide.⁸⁸

Thus, the conclusion is all but unavoidable that many volunteers are motivated to terminate appeals by a desire to commit suicide. "[G]iven the current legal norms prohibiting assisted suicide, we should ask whether, at least in some instances, the act of volunteering is best characterized as suicidal," an inquiry to which the current competency standard is indifferent.⁸⁹

Blume argues that in addition to a competency evaluation under the *Godinez* standard courts should ask whether a volunteer is motivated by the desire to commit suicide or the "desire to accept the justness of [his] punishment."⁹⁰ A competent inmate who volunteers out of a desire to accept his punishment should be allowed to waive appeals, but the state should not accommodate the desires of a suicidal volunteer.⁹¹ The court should make this determination by applying a two-part test.

First, the court must find that the punishment is objectively just, because "in order for acceptance of just punishment to legitimate what appears to be (and has the same consequences as) suicide, the punishment must actually be just."⁹² Under this prong of the test, Blume identifies three reasons that could preclude a death sentence: (1) factual innocence, that is, innocence of the underlying crime; (2) "innocence of the death penalty," which generally refers to the absence of an aggravating factor that renders a crime death eligible,"

86. *Id.* at 961–62 (citations omitted).

87. *Id.* at 962.

88. Blume, *supra* note 7, at 963.

89. *Id.* at 942, 973.

90. *Id.* at 968.

91. *Id.*

92. *Id.*

and; (3) categorical ineligibility, such as falling below the minimum age requirement or as a result of mental retardation.⁹³ At later stages few cases have non-frivolous claims of innocence, innocence of the death penalty, or categorical ineligibility, but in cases where such claims still exist, a court should rule on the merits of those claims before allowing the inmate to waive appeals.⁹⁴ The burden of persuasion would, of course, remain the same as pre-conviction.⁹⁵

Second, if the court is satisfied that the death penalty is just in the particular case, it should then

conduct a second, subjective inquiry: Why does the volunteer want to waive his appeals? If the answer is that, with due regard for individual variation in phrasing, he accepts that death is the appropriate punishment for his crime, then he should be permitted to waive his appeals. If, on the other hand, the motivation appears suicidal, then waiver should not be permitted.⁹⁶

Blume would place the burden on the proponent of the waiver, thus the death row inmate would bear the burden of showing that he is not motivated by the desire for suicide.⁹⁷ Finally, Blume proposes that the proof standard should be clear and convincing evidence.⁹⁸ Due to the high stakes of waiving appeals and the "high likelihood of suicidal motivation," a higher standard than mere preponderance is appropriate.⁹⁹ At the same time, "beyond a reasonable doubt" might carry too heavy a burden for those inmates legitimately motivated by a desire to accept their punishment.¹⁰⁰

Blume concludes by noting that death row inmates are not "fungible," and therefore individualization is paramount to adequately answering the questions that volunteerism raises.¹⁰¹ A workable response is unlikely from "sweeping generalizations," and it's only "by examining the motivation of each individual volunteer" that we will arrive at the right answers.¹⁰² Chapman's case provides a fertile ground on which to test Blume's proposal. The next part recounts the factual and procedural history of the case, and explores the Kentucky high court's ruling on mandatory appeal.

93. Blume, *supra* note 7, at 969 & n.147 (citations omitted).

94. *Id.* at 971.

95. *Id.*

96. *Id.* at 969.

97. *Id.* at 971-72.

98. Blume, *supra* note 7, at 972.

99. *Id.*

100. *Id.*

101. *Id.* at 983.

102. *Id.* at 984.

II. THE CHAPMAN CASE

A. *Facts of the Crime*¹⁰³

Early in the morning of August 23, 2002, Marco Allen Chapman knocked on the door of Carolyn and Chuck Marksberry's house in Warsaw, Kentucky, a small town about 45 miles from Cincinnati for which Carolyn served as city clerk.¹⁰⁴ Mr. Marksberry was overseas in Spain for job training.¹⁰⁵ Mrs. Marksberry was home, along with her three children, Courtney (age ten), Chelbi (age seven), and Cody (age six).¹⁰⁶ She answered the door and recognized Chapman, with whom she was acquainted.¹⁰⁷ Chapman had lived with her best friend, and Mrs. Marksberry, in fact, had recently encouraged her to get out of her "abusive" relationship with Chapman.¹⁰⁸ Chapman asked to use the phone, and Mrs. Marksberry let him in.¹⁰⁹

Chapman then pulled a knife from a duffel bag he was carrying, put the knife to Mrs. Marksberry's throat and asked for all her money and credit cards.¹¹⁰ He led her to the bedroom where he bound her with duct tape and a vacuum cleaner cord.¹¹¹ Chapman forcibly raped Mrs. Marksberry, stabbed her repeatedly, pausing more than once to go into the kitchen to replenish knives he had broken in the process.¹¹² He left her for dead, and then attacked the three children who were awakened by their mother's screaming.¹¹³

Chapman attacked Courtney, the oldest child, first, stabbing her numerous times and cutting her throat.¹¹⁴ Courtney went motionless, playing dead, forced to remain still to protect herself while watching Chapman attack her younger brother and sister.¹¹⁵ He stabbed both young children repeatedly, and

103. A more detailed factual narrative than is strictly necessary to analyze the legal issues is included. As Blume noted, individualization is vital when analyzing volunteerism, and individualization requires one to keep one eye on the particular crime—the defendant, the victims—and the other eye on the broader issues implicated.

104. Brief for Appellee, *supra* note 1, at 1; Mark Pitsch, *Two Gallatin Children Killed in Knife Attack; Mom, Sister Hurt; Suspect Arrested in West Virginia*, COURIER-JOURNAL (Louisville, Ky.), Aug. 24, 2002, at A1.

105. Pitsch, *supra* note 105.

106. Brief for Appellee, *supra* note 1, at 1–2.

107. *Id.* at 1.

108. Jim Hannah, Randy McNutt & Cindy Schroeder, *Mother, Children Stabbed, Two Fatally: Woman Urged Friend to Break Up with Suspect*, CIN. ENQUIRER, Aug. 24, 2002, at A1.

109. Brief for Appellee, *supra* note 1, at 1.

110. *Id.*

111. *Id.* at 2.

112. *Id.* at 2–3.

113. Joseph Gerth, *Police Say Murder Suspect in Knife Attack Confessed*, COURIER-JOURNAL (Louisville, Ky.), Sept. 11, 2002, at A1.

114. *Id.*

115. Brief for Appellee, *supra* note 1, at 2.

fatally slashed each of their throats.¹¹⁶ Courtney fled through the back door and sought help at a neighbor's house.¹¹⁷ Mrs. Marksberry, meanwhile, managed to free herself by chewing through the duct tape and kicking free from the electrical cord.¹¹⁸ She crawled through the house, past her son's dead body, and across the street, and woke up a neighbor by banging her head on the door.¹¹⁹ The police arrived to find Cody and Chelbi dead; they rushed Mrs. Marksberry and Courtney to the hospital.¹²⁰

Chapman fled the scene and stopped briefly at a family friend's house to clean himself up and borrow his friend's truck, leaving a note saying he was using it to pick up a load of firewood.¹²¹ Police mounted a swift interstate manhunt based on information from one of Chapman's former co-workers that he was headed to Cabin Creek, West Virginia.¹²² Within hours, Chapman was arrested in West Virginia, where police spotted him driving the truck he reportedly borrowed from his friend.¹²³ Police found blood on Chapman's clothing, a bloody knife in the truck he was driving, and blood in the car he left at his friend's house.¹²⁴

B. *Procedural Facts*

Marco Allen Chapman was arrested in West Virginia, less than 300 miles from the gruesome scene he left at the Marksberry's house, and just over six hours after the attacks.¹²⁵ He was arraigned in Charleston, West Virginia, and waived extradition proceedings on August 27, 2002.¹²⁶ Two days later, Chapman was received and arrested by Kentucky State Police, and placed in the Boone County Jail.¹²⁷ On August 30, a district judge set Chapman's bond at \$50 million and appointed John Delaney and Jim Gibson, of the Department of Public Advocacy, to defend Chapman.¹²⁸

After a preliminary hearing was held, a grand jury handed down a nine-count indictment against Chapman.¹²⁹ Chapman was charged with two counts

116. Gerth, *supra* note 113.

117. *Id.*

118. *Id.*

119. *Id.*

120. Hannah, McNutt & Schroeder, *supra* note 108.

121. *Id.*

122. Brief for Appellee, *supra* note 1, at 4.

123. *Id.* at 4–5.

124. Gerth, *supra* note 113.

125. *Id.*; Pitsch, *supra* note 105.

126. Brief for Appellee, *supra* note 1, at 5; Hannah, McNutt & Schroeder, *supra* note 108.

127. Brief for Appellee, *supra* note 1, at 5.

128. Jim Hannah, *Accused Held on \$50M Bond in Kids' Deaths*, CIN. ENQUIRER, Aug. 31, 2002, at B1; *see also* Brief for Appellee, *supra* note 1, at 6.

129. Brief for Appellee, *supra* note 1, at 5.

of murder, two counts of criminal attempt to commit murder, first-degree rape, first-degree robbery, first-degree burglary, and one count of being a second-degree felony offender (Chapman had been convicted of federal bank robbery in Texas).¹³⁰ The prosecutor immediately filed notice that the Commonwealth would seek the death penalty, based on aggravating circumstances including murder committed concurrently with other felonies and committing multiple murders.¹³¹ Chapman was arraigned on October 7, 2002, and, through his attorneys, pleaded not guilty.¹³² At pretrial hearings, a judge agreed to remove the case to neighboring Boone County¹³³ and decided that police had properly informed Chapman of his Miranda rights before an hour and a half long taped confession.¹³⁴

During a January 15, 2004 transfer for a pretrial hearing, Chapman managed to unshackle his legs and attempted to escape, running across a parking lot.¹³⁵ Court officers tackled Chapman within 10 yards, his hands still cuffed and chained at the waist.¹³⁶ Chapman explained later that it was a suicide mission, intended to provoke the police into shooting him on the spot.¹³⁷

Months later, in October of 2004, Marco Allen Chapman's intent to receive the death penalty came to the forefront of the case. Chapman wrote a letter to Circuit Judge Tony Frohlich, asking to fire his attorneys, plead guilty to the murders, and requesting a death sentence.¹³⁸ In the letter, Chapman claimed that he wanted "the Marksberry's to feel that justice has been served with my death, instead of a possibility of me living, when their children are dead from my hands."¹³⁹ Moreover, wrote Chapman, "I only wish the judge to sentence me to death so no one can feel responsible for another's death, including mine," because "I want no one to feel morally and/or spiritually wrong, because death is a just sentence that I am seeking for my sins."¹⁴⁰

Judge Frohlich refused to grant Chapman's request immediately, instead opting to send Chapman to the state's correctional psychiatric center for 30

130. Jim Hannah, *Death Penalty Sought in Stabbing*, CIN. ENQUIRER, Sept. 26, 2002, at 1C.

131. *Id.*

132. Tom O'Neill, *Courthouse Packed for Arraignment: Chapman Enters Not Guilty Pleas*, CIN. ENQUIRER, Oct. 8, 2002, at 1B.

133. Brief for Appellee, *supra* note 1, at 5.

134. *Id.*

135. Jim Hannah, *Accused Killer Fails in Run for Freedom*, CIN. ENQUIRER, Jan. 15, 2004, at C1.

136. *Id.*

137. Brief for Appellant, *supra* note 5, at 3.

138. Karen Gutierrez & Mike Rutledge, *Slain Kids' Family Hopes Accused Gets Death Wish*, CIN. ENQUIRER, Oct. 23, 2004, at B10.

139. *Id.*

140. *Id.*

days of evaluation and therapy to ensure his competence.¹⁴¹ The decision infuriated the victims' family, but seemed reasonable to the prosecution and was received favorably by the defense lawyers.¹⁴² According to Delaney, one of the public defenders, Chapman was "not competent to make those decisions," and the judge "was wise to wrestle with the issue now," because it would almost certainly have come back on appeal.¹⁴³

On December 7, 2004, Judge Frohlich granted Chapman's requests.¹⁴⁴ The judge, convinced of Chapman's competency based on the testimony of a psychiatrist, allowed Chapman to fire his attorneys and plead guilty to all eight charges.¹⁴⁵ According to a news report, "[o]ne document alone required his signature for each of 13 constitutional rights he waived in his quest to be put to death"¹⁴⁶ Judge Frohlich then asked the public defenders Delaney and Gibson to remain on "standby" in case Chapman needed counsel.¹⁴⁷ Delaney said he wanted to play no part in Chapman's "suicide," and both men agreed they would only serve if ordered by the court; Judge Frohlich ordered them to act as standby counsel.¹⁴⁸

On December 14, 2004, Marco Allen Chapman was sentenced to die for the murders of Chelbi and Cody Sharon.¹⁴⁹ Chapman represented himself at the hearing.¹⁵⁰ However, at least one more hurdle stood between Chapman and execution, namely, an appeal to the Supreme Court mandated by state law.¹⁵¹

C. *The Kentucky Supreme Court Reviews Chapman's Case*

In a unanimous opinion, the Supreme Court of Kentucky affirmed Chapman's conviction and death sentences.¹⁵² Chapman's new public defenders, who replaced the standby counsel, advanced a number of arguments, alleging constitutional violations and procedural problems, most of

141. *Id.*

142. Karen Gutierrez & Mike Rutledge, *Suspect in Kids' Killing Asks to Die*, CIN. ENQUIRER, Oct. 23, 2004, http://www.enquirer.com/editions/2004/10/23/loc_kypenalty23.html.

143. *Id.*

144. Mike Rutledge, *Murderer Pleads, Wants Death*, CIN. ENQUIRER, Dec. 8, 2004, at A1.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. Brief for Appellee, *supra* note 1, at 11.

150. Jim Hannah, *Judge Gives Killer His Wish: Death*, CIN. ENQUIRER, Dec. 15, 2004, at A1.

151. KY. REV. STAT. ANN. § 532.075 (2007). ("Whenever the death penalty is imposed for a capital offense, and upon the judgment becoming final in the Circuit Court, the sentence shall be reviewed on the record by the Supreme Court.")

152. *Chapman v. Commonwealth*, No. 2005-SC-000070-MR, 2007 WL 2404429 (Ky. Aug. 23, 2007).

which the Court disposed of easily on firmly established precedent.¹⁵³ However, the substance of the decision¹⁵⁴ centered on the issue of Chapman's competence, which the Court analyzed as two separate questions: What is the standard of competence to plead guilty? Is there a different standard of competence to plead guilty to a capital offense?

The Court first addressed the question of whether a higher standard of competence is required for defendants to plead guilty than to stand trial.¹⁵⁵ Kentucky's statutory definition of incompetence to stand trial closely parallels *Dusky*, which the Court also cited favorably:¹⁵⁶ "Incompetency to stand trial' means, as a result of mental condition, lack of capacity to appreciate the nature and consequences of the proceedings against one or to participate rationally in one's own defense[.]"¹⁵⁷ Adopting *Godinez*, the Court declined to create a higher standard to plead guilty, and found "the following logic expressed by the [*Godinez*] Court to be especially convincing:"

[A]ll criminal defendants—not merely those who plead guilty—may be required to make important decisions once criminal proceedings have been initiated. And while the decision to plead guilty is undeniably a profound one, it is no more complicated than the sum total of decisions that a defendant may be called upon to make during the course of a trial. . . . This being so, we can conceive of no basis for demanding a higher level of competence for those defendants who choose to plead guilty. If the *Dusky* standard is adequate for

153. *Id.* The arguments included, *inter alia*, that the death penalty is unconstitutional, that the court's method of conducting proportionality review was unconstitutional, and that lethal injection and electrocution violate the Eighth Amendment's ban on cruel and unusual punishment. *Id.* at *3. In denying the Eighth Amendment claim, the Court observed: "We have consistently held that neither lethal injection nor electrocution is an unconstitutional violation of the Eighth Amendment's proscription against cruel and unusual punishment, and Chapman has not presented anything causing us to doubt that conclusion." *Id.*

154. Competency was not the only defense theory that implicated the unique concerns raised by volunteerism. In fact, several of the other arguments are germane to a discussion of volunteerism more generally, but outside the scope of this article. For example, the defense argued that "[t]he trial court erred by requiring the same attorneys Chapman had already fired to serve as standby counsel since those attorneys disagreed with his stated goal of seeking the death penalty[.]" *Id.* at *3. The Court expressed disappointment with the prosecution's failure to respond to this particular argument on the part of the defense, but resolved the question in the Commonwealth's favor anyway. *Id.* at *5–6. The Court reasoned that despite Chapman's objection to any counsel at all, and standby counsel in particular, the Commonwealth's and the defendant's interests were well served by the attorneys staying on standby based on their familiarity with the case. *Id.* In addition, the defense argued the state was constitutionally bound to hear all mitigation evidence; the Court rejected the argument. *Id.* at *6–9.

155. *Id.* at *10–11

156. *Id.* at *10 n.49.

157. KY. REV. STAT. ANN. § 504.060(4) (2007).

defendants who plead not guilty, it is necessarily adequate for those who plead guilty.¹⁵⁸

So despite recognizing the extensive evidence of Chapman's troubled background offered by the defense,¹⁵⁹ the Court found that Chapman was competent to plead guilty. The Court did not end its inquiry there, however, but asked further whether the standard to plead guilty is higher in the context of a capital crime.

The heart of the defense's approach was to urge the Kentucky high court to recognize that the gravity of the stakes involved in pleading guilty to a capital offense demand a deeper inquiry into a defendant's competence.¹⁶⁰ The defense asked the court to adopt the purportedly higher standard of competence from *Rees v. Peyton*,¹⁶¹ as articulated by the Ohio Supreme Court in *State v. Ashworth* in the context of a volunteer's waiver of the presentation of mitigating evidence.¹⁶² The standard, according to the Ohio Court a "more specific statement of the general language used in *Rees*,"¹⁶³ is as follows:

A defendant is mentally competent to forgo the presentation of mitigating evidence in the penalty phase of a capital case if he has the mental capacity to understand the choice between life and death and to make a knowing and intelligent decision not to pursue the presentation of evidence. The defendant must fully comprehend the ramifications of his decision, and must possess the

158. *Chapman*, 2007 WL 2404429, at *11 (quoting *Godinez v. Moran*, 509 U.S. 387, 398–99 (1993)).

159. See Brief for Appellant, *supra* note 5, at 1–10. The defense showed evidence of Chapman's history of physical and sexual abuse, drug and alcohol addiction, depression and other mental illnesses, and several suicide attempts. See *id.* They attempted to argue that depression and suicidal preoccupation may have caused Chapman to plead guilty, even claiming the psychiatrist who examined Chapman and testified at each of his competency hearings "thought Chapman might decide not to plead to die if he were treated" for his depression. *Id.* at 9. Without any legal authority on which to hang, however, these arguments amounted to little more than an opportunity to reiterate the truly tragic history of their client.

160. See Brief for Appellant, *supra* note 5, at 10–26.

161. 384 U.S. 312, 314 (1966) (directing the lower court to determine the defendant's "competence in the present posture of things, that is, whether he has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises."'). Note that *Rees*' status in federal law is unclear at this point. *Rees* involved a capital defendant withdrawing his petition for certiorari, a context very similar to the various modes of volunteering. See *id.* at 313–14. The *Godinez* majority paid it little attention, citing it only in a footnote leading one to believe that its application is only appropriate in the context of withdrawing certiorari, *not*, in the context of death row volunteering and competency generally. *Godinez*, 509 U.S. at 398 n.9.

162. Brief for Appellant, *supra* note 5, at 11–12, 16 (citing *State v. Ashworth*, 706 N.E.2d 1231, 1240 (Ohio 1999) (citing *State v. Berry*, 659 N.E.2d 796 (Ohio 1997))).

163. *Ashworth*, 706 N.E.2d at 1241.

ability to reason logically, *i.e.*, to choose means that relate logically to his ends.¹⁶⁴

Although the Kentucky Supreme Court distinguished *Rees*,¹⁶⁵ it went on to adopt Ohio's *Ashworth* test, the very test propounded by the defense, verbatim.¹⁶⁶ The defense won the point, it seems, but lost the game, set, and match.

Applying the defense's own competency test, the Court affirmed the trial judge's finding that Chapman was competent to plead guilty to capital crimes.¹⁶⁷ A psychiatrist evaluated Chapman on three separate occasions, and each time found him competent while acknowledging his troubled history of abuse, addiction, and mental illness.¹⁶⁸ "Moreover, the trial court refused to accept passively Chapman's guilty plea, instead referring him for treatment at [the Kentucky Correctional Psychiatric Center] before accepting his guilty plea."¹⁶⁹ Although the defense criticized the judge for only ordering a thirty-day evaluation of Chapman, "from [the Court's] vantage point, the trial court should be commended, not condemned, for taking extraordinary precautions to ensure that Chapman was pleading guilty knowingly, intelligently, voluntarily, and competently."¹⁷⁰

If the defense won the issue and persuaded the Court to apply a supposedly heightened standard for competency in the context of volunteering for death row, then why did it still lose the appeal? Is the Kentucky Supreme Court's new standard an improvement on *Dusky & Drope*, and, by extension, *Godinez*? The next part will analyze the result in the Chapman case, and explore whether the scholars, and in particular John Blume, offer a better, workable approach.

164. *Id.*

165. The Court argued what really concerned the *Rees* Court was that the defendant abandoned his defense suddenly. *Chapman*, 2007 WL 2404429 at *14. The case was not an ideal fit because Chapman essentially abandoned his defense from day one. *Id.* It is debatable whether it is more striking for a defendant who has been on death row for a decade or more and exhausted the appeals process to "suddenly" abandon his writ of certiorari (a long shot, to be sure), than for a defendant never to mount any kind of defense, but rather plead guilty and seek the death penalty for himself. Some commentators have argued that the demoralizing life on death row leads many inmates to give up hope and waive appeals, that is, volunteer, in order to escape the hopelessness. *See, e.g.*, Urofsky, *supra* note 15, at 568–73 (describing, through first-hand accounts, the demoralizing conditions of life on death row, and concluding "[i]f one is going to argue that even condemned murderers retain some spark of humanity, some rights of individual autonomy, then something must be done to either improve death row conditions, or permit those who wish to terminate that existence through execution of sentence the right to do so").

166. *Chapman*, 2007 WL 2404429 at *15 (quoting *Ashworth*, 706 N.E.2d at 1241).

167. *Id.* at *16.

168. *Id.* at *15.

169. *Id.*

170. *Id.*

III. ANALYZING *CHAPMAN*A. *Was Chapman Competent Under the Legal Standard?*

Examining the *Chapman* result from a legal perspective, it is difficult to argue that the Kentucky Supreme Court got it wrong. The *Godinez* majority stated plainly, that “[w]hile psychiatrists and scholars may find it useful to classify the various kinds and degrees of competence, and while States are free to adopt competency standards that are more elaborate than the *Dusky* formulation, the Due Process Clause does not impose these additional requirements.”¹⁷¹ The Kentucky Court took them up on the offer and adopted a standard that articulates a more specific standard for the context of a death penalty volunteer. *Dusky & Drope* require a defendant exhibit (1) a sufficient present ability to consult with counsel and to assist in preparing his defense with a reasonable degree of rational understanding, and (2) a rational and factual understanding of the nature and object of the proceedings against him.¹⁷² The new *Chapman* standard requires a defendant to have the mental capacity (1) to understand the choice between life and death, (2) to make a knowing and intelligent decision not to pursue his defense, (3) to fully comprehend the ramifications of his decision, and (4) to reason logically, that is, to choose means that logically relate to his desired ends.¹⁷³

The Kentucky Court applied this test to Chapman and yet found him competent.¹⁷⁴ It is not a surprising result for this case, however, and not only because the clear error standard of review imposes a high bar for overturning the trial judge’s ruling.¹⁷⁵ As the Court noted, the trial judge was exceptionally thorough, and approached the determination of Chapman’s competence with abundant caution.¹⁷⁶ Chapman’s mental health was examined on three separate occasions, each including extensive interviews and testing, and each followed by a hearing at which the evaluating psychiatrist testified and the judge found Chapman competent.¹⁷⁷ The third evaluation followed a thirty-day observation at the Kentucky Correctional Psychiatric Center and included a neuropsychological examination, and it was only after this additional precaution and a forty-minute colloquy that the judge accepted Chapman’s guilty pleas and death sentence.¹⁷⁸

171. *Godinez v. Moran*, 509 U.S. 389, 402 (1993).

172. *Dusky v. United States*, 362 U.S. 402, 402 (1960); *Drope v. Missouri*, 420 U.S. 162, 171 (1975).

173. *See Chapman*, 2007 WL 2404429 at *15.

174. *Id.* at *16.

175. *See id.*

176. *See supra* text accompanying notes 167–71.

177. Brief for Appellee, *supra* note 1, at 6–10.

178. *Id.*

The defense characterized these hearings as tainted by “leading questions” met with simple “yes and no” answers, and claimed that “Chapman appeared to simply be saying what he knew he needed to say to accomplish his suicide”¹⁷⁹ The judge’s colloquy with Chapman was “superficial” rather than the “penetrating and comprehensive examination” required.¹⁸⁰

The prosecution, predictably, took a different view of the trial judge’s procedures. “Ordering three evaluations and conducting three competency hearings was the product of conscientiousness and thoroughness on the part of the learned trial judge.”¹⁸¹ Far from being superficial, the “colloquy conducted here could fairly be described as a clinic on how to make absolutely certain that a guilty plea is knowing, intelligent, and voluntary.”¹⁸² In fact, the trial judge expressed a belief that the standard for competency to stand trial was not the same as the standard to dismiss counsel, plead guilty, or request the death sentence, and instead applied a more exacting standard.¹⁸³

Under these circumstances, it is difficult to conclude that Chapman was not in fact competent under either the previous standard or the *Chapman* Court’s new standard, and the defense’s conclusory allegations about the inadequacy of the hearing does little to change that conclusion. Under Kentucky’s normal standard, Chapman did not appear “as a result of mental condition, [to] lack . . . capacity to appreciate the nature and consequences of the proceedings against [him] or to participate rationally” in his own defense.¹⁸⁴ Even under the new, arguably more specific standard, Chapman appeared to comprehend the magnitude of his decision. In his letter to the trial judge, Chapman wrote:

I don’t understand why these crimes occurred and I only want to finally end all the pain and suffering in all of thoes around me. I am so sorry and remorseful for the crimes I have committed that the pain and guilt have become to much for me to bare. I have had a troubled life but it doesn’t give me the right or excuse to inflict pain on others. Especially children.

I feel with me being executed is the only way that the Marksburys will have peace of mind as well s me. That may sound selfish on my part but truely I only want this to be over with so they can finally have closure and begin to heal.¹⁸⁵

In light of the three separate psychiatric evaluations and extensive questioning by the trial judge, the sentiment of this letter underscores that Chapman likely

179. Brief for Appellant, *supra* note 5, at 21, 25.

180. *Id.* at 23, 25 (quoting *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948)).

181. Brief for Appellee, *supra* note 1, at 12.

182. *Id.* at 14–15.

183. *Id.* at 9.

184. See KY. REV. STAT. ANN. § 504.060(4) (2007).

185. Brief for Appellant, *supra* note 5, at 41 (reproduced without corrections).

knew very well the choice between life and death, understood his decision not to pursue his defense, fully comprehended the ramifications of his decision, and chose logical means—execution—to obtain his desired end—to put to rest the suffering of his victims' family and himself.

Thus, under the legal standard, Chapman was likely competent. But that does not address the propriety or deficiency of the legal standard itself. For the opponent of volunteering, the result is still unsatisfactory, begging the question, does the Kentucky standard cure the perceived ills of the *Godinez* standard?

B. Did Kentucky Choose the Right Standard?

Both the *Godinez* dissent¹⁸⁶ and the Ninth Circuit's opinion in the same case¹⁸⁷ raised specific concerns about the effect mental illness or medication may have on a defendant's decision to waive counsel and plead guilty. The tests propounded by each sought to account for this distinction by adding the requirement that the defendant have the capacity for reasoned or rational choice, not simply understanding.¹⁸⁸ Both opinions focused attention on the defendant's depression in particular, and the possibility that the defendant gave up on his defense as a result of being depressed.¹⁸⁹ Chapman's lawyers echoed this concern arguing, if somewhat vaguely, that Chapman's dismissal of counsel and guilty pleas may have been the result of his depression.¹⁹⁰ However, it is not clear how, in either Moran's or Chapman's case, the proposed "heightened" standard would have better answered this problem.

The *Godinez* dissent, for example, does not make it clear how requiring an increased capacity to represent oneself would have affected the defendant's competency. The opinion quoted one of the testifying psychiatrist's opinions that the defendant was "in full control of his faculties insofar as his ability to aid counsel, assist in his own defense, recall evidence and to give testimony if called upon to do so."¹⁹¹ What the dissent found worrisome, in addition to the prescription drugs the defendant was taking, was that the psychiatrist also observed, "[p]sychologically, and perhaps legally speaking, this man, because

186. *Godinez v. Moran*, 509 U.S. 389, 409 (1993) (Blackmun, J., dissenting) ("the majority upholds the death sentence for a person whose decision to discharge counsel, plead guilty, and present no defense well may have been the product of medication or mental illness.").

187. *Moran v. Godinez*, 972 F.2d 263, 268 (9th Cir. 1992) (noting that the evaluating psychiatrist commented that defendant's depression may cause him to expend less effort in his defense, and that the doctor's report "is all the weaker as an indication of [defendant's] competency to waive his constitutional rights because it says nothing about the effects of any medication").

188. *Godinez*, 509 U.S. at 415.

189. *Id.* at 409–10; *Moran*, 972 F.2d at 268.

190. Brief for Appellant, *supra* note 5, at 6, 9.

191. *Godinez*, 509 U.S. at 409 (internal quotation marks omitted).

he is expressing and feeling considerable remorse and guilt, may be inclined to exert less effort towards his own defense.”¹⁹² The opinion does not make specific claims of diminished capacity, or explain how this particular death row convict’s understandable remorse and guilt would leave him unable to participate actively in his own defense. Chapman’s lawyers made a similar conclusory argument—his history of abuse, suicidal thoughts and mental illness “may have caused him to make [the] decision” to dismiss counsel, and plead guilty.¹⁹³ Notably absent is any specific argument, under the legal standard the Kentucky Court chose to adopt, that these facts rendered him incompetent.

In fact, what seems to underlie the losing arguments in both cases is a concern not about capacity, but about motivation. That is, the defendant’s hopeless outlook rather than his diminished capacity to reason, caused him to make poor legal decisions. A plausible reading is that the losing side, in each case, the side that would have found the defendant incompetent, was grasping not for a standard that more precisely assessed a defendant’s functional ability to make life and death decisions for himself without the aid of counsel, but for a standard that would prevent a defendant from volunteering.¹⁹⁴

In other words, a standard of competency that focuses on capacity, no matter how elaborate and nuanced, will not necessarily alleviate the concerns of those of us whose visceral reaction to Chapman’s case is that something in our justice system is broken—that even a patently guilty defendant should not be given the key to the execution chamber and told, “We’ll leave the light on for you.”® What, then, could be a practicable safeguard to bar convicts from committing “suicide by court”? John Blume offers a solution that requires courts to apply a “competence *plus*” test, where competence alone seems inadequate.

C. *Is Competence Enough?*

Blume’s proposal is not a clarification of, or elaboration on, a competency standard, but instead creates an additional requirement courts could impose before allowing a defendant to volunteer.¹⁹⁵ Applying Blume’s two-pronged test to Chapman’s case is an instructive exercise which sheds clarifying light on why many legal scholars may have an instinctual repulsion to the Kentucky Supreme Court’s opinion in *Chapman*.

First, the objective prong: is the punishment actually just, or was Chapman perhaps factually innocent, innocent of the death penalty, or categorically

192. *Id.* at 409–10 (internal quotation marks omitted).

193. Brief for Appellant, *supra* note 5, at 6.

194. This certainly reinforces the conventional wisdom that capital punishment abolitionists oppose volunteerism. *See supra* note 16.

195. *See supra* text accompanying notes 89–99.

ineligible?¹⁹⁶ Chapman, of course, was not found guilty beyond a reasonable doubt by a jury of his peers, but rather pleaded guilty to each of the charges against him. The evidence against him, however, was effectively incontrovertible, so assuming his factual guilt is not a stretch. This assumption, by extension, establishes the aggravating factors which made his crimes death eligible, so he was not innocent of the death penalty. Finally, there is no indication of mental illness or any other factor that would have left him categorically ineligible for execution. So the punishment was objectively just—with the conspicuous caveat that none of these issues was actually litigated (discussed below)—so next is the subjective inquiry.

Was Chapman motivated by a desire to accept the justness of his punishment or by a desire to commit suicide? Recalling that Blume proposed applying the clear and convincing standard of proof and saddling the defendant with the burden,¹⁹⁷ is it clear what motivated Chapman's guilty pleas? I would argue that it is not at all clear in Chapman's case what his primary motivation was, and it is unclear in Blume's proposal how such a case of "mixed motives" should be handled.

Chapman had attempted suicide in the past.¹⁹⁸ In fact, the day he was arrested he pleaded with the police to shoot him because all that could help him now was "the electric chair."¹⁹⁹ He later engineered a ham-handed escape attempt, running from his guards, still shackled, in a self-styled suicide mission shouting, "Shoot me, Shoot me!"²⁰⁰ Moreover, he referred explicitly to his desire to commit "suicide by court."²⁰¹

On the other hand, there was substantial evidence that he was motivated by remorse and acceptance of the punishment he felt he deserved. In his letter to the trial judge, Chapman admitted: "I have had a troubled life but in [sic] doesn't give me the right or excuse to inflict pain on others. Especially children."²⁰² "I only wish the judge to sentence me to death so no one can feel responsible for another's death, including mine," because "I want no one to feel morally and/or spiritually wrong, because death is a just sentence that I am seeking for my sins."²⁰³ At his sentencing hearing, Chapman reiterated his remorse: "It probably means nothing, but I do want to apologize to Caroline Marksberry, to her family, her children and to everybody I've hurt. I don't know exactly what happened that night, though whatever I did, all I know is I

196. Blume, *supra* note 7, at 968–69.

197. *Id.* at 971–72.

198. Brief for Appellant, *supra* note 5, at 2–3.

199. *Id.* at 3.

200. *Id.*

201. *Id.*

202. *Id.* at 41.

203. Gutierrez & Rutledge, *supra* note 138.

can't undo what I've done."²⁰⁴ "[I]t is not honorable for me to do what I am doing," Chapman said of his decision to plead guilty and seek the death penalty, he was doing it for Marksberry and her family.²⁰⁵

It is hard to say how a court applying Blume's test, which essentially calls for a binary determination of motivation, would resolve Chapman's case. The evidence cuts both ways, of course. But beyond that, the suicide motivation and the "acceptance of just punishment" motivation seem to exist not in varying measures side by side, but in interdependence. That is to say, Chapman's desire for "suicide by court" can plausibly be interpreted as a desire to have his just sentence carried out more swiftly for the benefit of all parties—the state, the victims, and himself. He desired his own death, to be sure, but that desire was, at least in some measure, fueled by genuine contrition and a clear understanding of the price that he should pay. Ultimately, applying Blume's test requires an oversimplification of something which is irreducibly complex, human motivation, and thus, fails to address the possibility that "conflicting" motivations may be fundamentally intertwined.²⁰⁶ Although he claims, perhaps rightly, that the current legal standard of competency is not "sufficiently nuanced to protect against death-row inmates using the legal system as a means of suicide,"²⁰⁷ his proposal fails Chapman for lack of nuance, which hints at the conclusion that adjudicating motivation in this context is impracticable.

D. *If Not Competence, Then What?*

Adjudging competence with heightened specificity, or measuring competence *and* motivation both potentially fail to prevent death row inmates like Marc Allen Chapman from fast-tracking their executions. Yet the opponent of volunteerism is still left with a sense that something in the system needs serious repair. Chapman's lawyers noted that "[t]he public has an interest in the reliability and integrity of a death sentencing decision that transcends the preferences of individual defendants."²⁰⁸ But according to the *Chapman* Court, society's interest in maintaining reliability and integrity in

204. Brief for Appellant, *supra* note 5, at 41.

205. *Id.*

206. It is worth noting that I am not suggesting our judges and juries are fundamentally incapable of assessing motive or intent. As Blume acknowledges, our system operates with a tolerable level of uncertainty in assigning criminal culpability, a task we entrust daily to judges and juries. Blume, *supra* note 7, at 970. I am simply suggesting that such assessments are inappropriate in this context. In the normal criminal context, the finder of fact is asked to determine whether the defendant's mental state reached a certain degree, such as malice aforethought. Blume would ask the fact finder to separate and then compare two mental states that, I argue, may be inextricably linked.

207. Blume, *supra* note 7, at 973.

208. Brief for Appellant, *supra* note 5, at 27 (citations omitted).

meting out capital punishment is sufficiently preserved by the procedural safeguards already in place:

“[T]he required reliability is attained when the prosecution has discharged its burden of proof at the trial and penalty phases pursuant to the rules of evidence and within the guidelines of a constitutional death penalty statute[.] A judgment of death entered in conformity with these rigorous standards does not violate the Eighth Amendment reliability requirements.”²⁰⁹

Here, the Kentucky Supreme Court was quoting from *People v. Bloom*,²¹⁰ a California case, but it is interesting to note what the Court omitted between the ellipses. Here is the full text of the quoted section:

Rather, the required reliability is attained when the prosecution has discharged its burden of proof at the guilt and penalty phases pursuant to the rules of evidence and within the guidelines of a constitutional death penalty statute, *the death verdict has been returned under proper instructions and procedures, and the trier of penalty has duly considered the relevant mitigating evidence, if any, which the defendant has chosen to present.* A judgment of death entered in conformity with these rigorous standards does not violate the Eighth Amendment reliability requirements.²¹¹

This highlights the biggest concern in Chapman’s case, which goes beyond competence: are the procedural safeguards doing enough to prevent abuse of the system? For Chapman, there simply was no death verdict and no mitigating evidence was presented.

Perhaps further procedural safeguards could limit a volunteer’s access to the court system for the purpose of committing suicide. In a thorough, lucid article, Anthony Casey proposes balancing the interests of the state and interests of the inmate at different stages of capital proceedings.²¹² Casey would limit an inmate’s right to volunteer at stages where the state’s interest in fair and reliable application of the death penalty is at its highest, and the convict’s interest in having his just punishment carried out without unreasonable delay is at its weakest.²¹³ The risks to the state’s interest in not convicting an innocent person or not convicting a person insufficiently culpable is too high at the trial and sentencing stages to allow a defendant to plead guilty or waive the presentation of mitigating evidence.²¹⁴ As time passes after conviction and sentencing, the balance tips in favor of the

209. Chapman, 2007 WL 2404429, at *9 (quoting *People v. Bloom*, 774 P.2d 698, 719 (Cal. 1989)).

210. 774 P.2d 698.

211. *Id.* at 719 (emphasis added).

212. Casey, *supra* note 7, at 77.

213. *Id.* at 101–02.

214. *Id.* at 105.

defendant's interest in humane and reasonably timely punishment.²¹⁵ By that point, the state's interests have been sufficiently protected by a full trial and sentencing proceedings which included mitigating and aggravating evidence, so the inmate should be allowed to waive post-conviction relief.²¹⁶

While a few states have in place procedural safeguards roughly equivalent to Casey's proposal, Kentucky does not.²¹⁷ Needless to say, the trajectory of Chapman's case under such a regime may well have been vastly different. First, consider the evidence that Chapman may have been under the influence of drugs at the time of the crimes, that he was prone to dissociative states, and that he testified that he did not remember what happened on the night of the murders.²¹⁸ It is not too far-fetched that a jury could have found that Chapman did not have the mental state required for first-degree murder.

Moreover, the defense adduced substantial evidence of Chapman's shockingly troubled background. He was abused physically by both of his parents, abused sexually by his father, and he began drinking alcohol and using drugs as early as age eight.²¹⁹ Chapman suffered from bipolar disorder, post-traumatic stress disorder, dysthymic disorder, gender identity issues, and attempted suicide as a teenager.²²⁰ In addition to binge-drinking, Chapman abused drugs, including marijuana, LSD, heroin, cocaine, crack, and methamphetamine.²²¹ A jury may have taken this evidence into account as mitigation, and perhaps would not have returned a death sentence in a proper sentencing hearing.

In sum, Chapman's case very easily could have turned out differently with stricter procedural checks in place. Casey's proposal is measured and sensible, and perhaps represents a practicable option for the opponents of volunteerism.

IV. CONCLUSION

However, the fact remains that Kentucky does not prevent capital defendants from waiving presentation of mitigating evidence so long as the defendant is competent. Actually, of all the thirty-eight states that recognize capital punishment, only one state, New Jersey, mandates the presentation of mitigating evidence.²²² Furthermore, just two states, New York and Arkansas, prohibit a defendant from pleading guilty to a capital crime.²²³ While almost

215. *Id.* at 101–02.

216. *Id.* at 102–03.

217. Casey, *supra* note 7, at 86–93.

218. Brief for Appellant, *supra* note 5, at 3, 40–41.

219. *Id.* at 1.

220. *Id.* at 2, 7.

221. *Id.* at 2.

222. Casey, *supra* note 7, at 91.

223. *Id.* at 92.

all states mandate appellate review of death penalty cases,²²⁴ this is small consolation to opponents of volunteerism, as higher standards of review favor leaving trial proceedings undisturbed and few sentences are likely to be overturned. Additional procedural checks may indeed represent the best vehicle for “stopping the rush to the death house”²²⁵ since more elaborate standards of competence are unlikely to yield consistently more “favorable” results. But the fact that so few states have erected barriers to volunteering (other than mandatory post-conviction appeals) evinces a general mood in favor volunteerism, or at least reluctance to change the system.

Opponents of death row volunteerism thus have the immense task of changing the prevailing attitudes of lawmakers, judges, and the public. For example, Blume’s two-pronged test is premised upon society’s general disapproval of suicide.²²⁶ Courts at least, and perhaps society in general, simply may not choose to think of volunteerism as a form of suicide, even for those convicts who clearly express a desire to commit “suicide by court.”²²⁷ Perhaps the prevailing opinion, and arguably the belief implicit in a layperson’s lack of concern for the plight of a demonstrably guilty volunteer, is that if a person has committed a capital crime, then a suicidal motive coupled with a request for the state to hasten execution is actually a justifiable

224. *Id.* at 87–88.

225. See Jane L. McClellan, *Stopping the Rush to the Death House: Third-Party Standing in Death-Row Volunteer Cases*, 26 ARIZ. ST. L.J. 201 (1994).

226. Blume, *supra* note 7, at 946–47.

227. In Chapman’s case, for example, the Court simply rejected the notion that a defendant who pleads guilty to a capital crime is committing a form of suicide:

We reject Chapman’s related contention that a defendant who pleads guilty in order to receive the death penalty is committing state-assisted suicide. As previously noted, any guilty plea in a capital case in which a defendant seeks to receive the death penalty must be closely scrutinized to ensure that it protects the constitutional rights of the defendant, as well as the Commonwealth’s interest in ensuring that the death penalty is not used to further a defendant’s suicidal motives. That scrutiny negates the possibility that a defendant is using the capital punishment scheme as a method to commit suicide. Thus, we refuse to issue a blanket holding that a competent defendant’s plea of guilty in which he seeks a legally permissible sentence devolves into an unconstitutional plea because the sentence sought by the defendant is death. And our review of the record in this case, as demonstrated in this opinion, shows that Chapman’s plea was competently, knowingly, intelligently, and voluntarily made. Furthermore, the death penalty is not a disproportionate sentence for Chapman’s heinous offenses. So Chapman’s plea is not an impermissible ‘suicide by court.’”

Chapman v. Commonwealth, No. 2005–SC–70–MR, 2007 WL 2404429, at *13 (Ky. Aug. 23, 2007). (citations omitted). It is clear from the Court’s opinion on competence and its adopted standard that a suicidal motivation does not play into its determination of competence. So, what the court is essentially saying is that asking for the state to put you to death is not suicide if you have committed a crime deserving of a death sentence (or at least if you have pled guilty to such a crime).

acceptance of the punishment he deserves, something quite distinct from suicide under other circumstances.

While both Blume's and Casey's proposals merit serious consideration, one cannot consider either without plunging back into the philosophical debate over volunteering. Each is viable only if you first accept that there *should* be some check on a death row convict's freedom to choose his own destiny. And perhaps this makes each proposal equally unlikely to make the leap from the pages of the law review to the pages of the legislative code or case reporter. On the scales of public opinion, how do you balance impartially the abstract, incorporeal interest of the state in maintaining consistency and reliability in death sentencing on one side, and the personal interest of the death row inmate in autonomy, self-determination, and dignity on the other side? This is not because public sympathy will be with the condemned but because the victim's family—too often the forgotten constituency in scholarship, yet undeniably the party for whom the public is most acutely concerned—often shares an identical interest with the inmate in accelerating the execution.²²⁸

Entrenched as capital punishment is in states such as Kentucky, it is perhaps unrealistic to think that they would implement a comprehensive set of restrictions on volunteering such as the one Casey suggests. At the very least, however, I would suggest the state's interest in fair administration of the death penalty is simply too strong to allow a defendant to plead guilty to a capital crime with no adjudication of culpability on the merits.²²⁹ Casey's analysis on this point is helpful:

The entering of a plea of guilty removes the reasonable doubt burden and replaces it with a burden that normally falls around factual basis or factual foundation. Furthermore the guilty plea eliminates the full presentation of evidence at trial. This has two effects. First, the establishment of guilt is based on a less rigorous proceeding. Second, a later review of the finding of guilt, such as on appeal, must be conducted without the benefit of a full trial record, rendering such a review less effective in assuring a certainty of guilt. The responsibility to ensure non-arbitrary application, if taken seriously, suggests that the burden of proof and presentation of evidence should be constant in all cases. Recognizing this, one court noted that public policy required the state to impose "the supreme penalty only when a jury of twelve has been convinced

228. Undoubtedly a significant bar to reforming any aspect of the death penalty is that supporting the rights of death row convicts to live longer does not play well with voters. One can imagine a state legislator losing her seat because, according to the television attacks of her opponent, "She favors murderers over victims' families."

229. It is not clear how such a requirement would operate. It is certainly not a simple solution, for in the volunteer context it would inevitably bump up against the right to self-representation, among other constitutional issues.

beyond a reasonable doubt of the guilt of the accused after a trial conducted with all the safeguards appropriate to such proceedings.”²³⁰

Chapman’s case provides a clear illustration of this problem. Perhaps allowing a defendant to seek and ultimately to receive death, even if he may not otherwise have been convicted of and sentenced for a capital offense, purchases his autonomy at too high a price and moves us dangerously close to legitimizing “suicide by court.”

At the same time, Chapman’s case counsels us not to detach policy discussions about capital punishment from the real life devastation that capital murder leaves behind. Chapman himself seemed genuinely to regret his savage crimes, and so the court’s consent in his decision to submit to punishment without undue delay might have allowed him to retain a shred of dignity in death. The hope is, more importantly, that it afforded Carolyn Marksberry, Courtney Sharon, their family and friends some measure of finality and repose in which to heal.

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230. Casey, *supra* note 7, at 96 (quoting State v. Watkins, 194 S.E.2d 800, 810 (N.C. 1973)) (internal citations omitted).

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